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SUPREME COURT OF THE UNITED STATES.

No. 17.

WILLIAM PEERSOL ET AL., COMPLAINANTS AND APPELLANTS,

VERSUS

JAMES ELLIOTT ET AL.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE KENTUCKY DISTRICT.

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Pleas before the Honorable John McLean and John Boyle, Judges of the seventh circuit court of the United States of America, in and for the district of Kentucky, held at the capitol in the town of Frankfort, at the May term of said court, in the year of our Lord one thousand eight hundred and twenty-nine.

Be it remembered that heretofore, to wit, on the 14th day of December, in the year 1825, came William Peersol, &c., by their counsel, into the clerk's office of the court aforesaid, and filed the following bill in chancery against James Elliott, &c., to wit:

To the Honorable the Judges of the circuit court of the United States for the district of Kentucky in chancery sitting. William Peersol, and Lydia Peersol his wife, Ann North, Jane North, Sophia North, Elizabeth F. P.

North, and William North, heirs and representatives of Sarah Elliott, late Sarah Peart, and citizens of the State of Pennsylvania, humbly complaining, shew that the said Sarah Peart departed this life intestate, possessed in fee of a very valuable tract of land in the county of Woodford, yielding profit and rents to the amount of dollars, leaving your orators her only heirs at law; that, previous to her death, her late husband, James Elliott, had procured to be made and recorded a paper purporting to be the act and deed of said Sarah and himself, by which they purported to convey the whole interest in said land to a certain Benjamin Elliott, who is made defendant to this bill; that Benjamin Elliott thereafter or theretofore conveyed the same land to the said James Elliott. Which of these acts was first performed is difficult to ascertain, owing to the confusion in the dates and times of acknowledgments. All of which will most manifestly appear by an inspection of said instruments, or copies thereof, to which reference is prayed.

Your orators charge that they believe the fact to be, that said deed never was signed by said Sarah G. Elliott, but by some other, who has attempted to affix her name or counterfeit her handwriting; nor was the same ever sealed or delivered by her, except in some such manner following, to wit:

Your orators state that they are informed and believe that the said James Elliott, with a view to secure the land to himself, induced the said Sarah G. Elliott to believe that the paper conveyed only an estate for life, or that he would make to her a paper to reassent to her an estate in fee, if she would secure him an estate for life only in her lands; that with this view he induced her to accompany him to the clerk's office, with himself alone, about nine miles, and there to acknowledge the deed before the clerk, without said deed being explained to her, or any privy examination whatever; that such was her constant declarations in relation to the transaction, until the day of her death, repeatedly made to her confidants and friends. Your orators state that the clerk made no record of her privy examination—only a simple acknowledgment of the deed; that this fact, at the instance of the said Sarah, was examined into and ascertained before her death, and the clerk notified by the attorney of your orator, who was requested to examine into the business by the said Sarah. Your orator states that said Sarah, about the day of departed this life; that your orators said attorney thereafter procured from the clerk a true copy of the record of said deed and acknowledgment, which is herewith filed, and made a part of this bill. Your orators state that shortly after the death of said Sarah, the said James, by himself and agent or attorney, endeavored to prevail upon the clerk to change his certificate, or to make an additional certificate of the acknowledgment of the deed, but being unsuccessful, thereafter, by an ex parte motion, prevailed upon the county court to order the deed to be recorded, and a certificate drawn out by the attorney of said James Elliott, to be recorded. That this proceeding took place after the death of the said Sarah, and after your orators had brought an action of ejectment in this court for the land, which was then pending.

Your orators state that said James thereafter departed this life, leaving James Elliott, Cordelia Elliott, Betsey Rogers, wife of John Rogers, the said Benjamin Elliott, and A. L. Elliott his wife, John Moore, and M. T. Moore his wife, Virginia Elliott, and Lucy Elliott, citizens of Kentucky, his heirs at law, and who are, with the husbands, made defendants to this bill; that the action of ejectment being revived as to the possession of the said James, deceased, was revived against said James the younger, as testenant. Your

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orators state that their said action of ejectment came on to be heard at the present term of this honorable court; and, after a full and fair trial, the right of title adjudged to be in your orators, and a judgment of eviction given against the defendants, as will better and at large appear by the records and proceedings now before your honors, and which are also made a part of this bill.

Your orators state that the said heirs have severally or jointly leased to sundry others, tenants, and the tenants against which they have brought suit and recovered judgment; that considerable sums remain in the hands of the other defendants than the said James, due for rent, which is claimed by the defendants in his bill, who will, as your orators fear, receive the rents and apply them to their own use; they state that they are informed and believe that some of the defendants are without property; and that, if the tenants pay the rent over into the hands of the heirs, that the same will, in whole or in part, be lost by the insolvency or removal of the persons who may be ultimately liable to your orators; to remedy which, your orators pray a receiver may be appointed to receive and hold the rents, issues, and profits of the land, until this suit is heard and tried. Your orators charge that they are threatened with a writ of error, and are fearful that some such dilatory step may be taken by the defendants. Your orators state that the said defendants have been, by themselves and their tenants, receiving rents, as well as cutting and destroying the timber, and thereby doing great waste; they also fear and believe that they will continue to do so unless restrained by this honorable court. Your orators would state that they are fearful that the defendants may attempt to use the said deed to harass them or their tenants or alienees in future controversy, or that the said deed may prevent a sale of, or otherwise affect the value of their land, if the same is not given up or cancelled. To the end, therefore, may it please your honors to grant to your orators the United States writ of subpœna, by which the defendants may full, true, and perfect answer make to all and singular the allegations of this bill, and an injunction restraining said defendants, and each of them, and their tenants or agents, from committing spoil or waste in any manner, until the matter is fairly heard in equity; and by a decree of your honors, may the defendants be decreed to account for the rents and profits of the land since the death of Sarah G. Elliott, as well as for all spoil and waste committed; and the said defendants be decreed to surrender the said deed, to be cancelled; and such other and further relief be decreed as their case may require, or to justice shall appertain; and they will pray, &c.

R. WICKLIFFE.

The following is the deed referred to in the foregoing bill, to wit:

This indenture, made this 12th day of June, 1813, between James Elliott and Sarah G. Elliott, of the county of Woodford, and State of Kentucky, of the one part, and Benjamin Elliott, of the county of Fayette, and State aforesaid, of the other part, witnesseth, that the said James Elliott and Sarah G. Elliott, for and in consideration of the sum of ten thousand dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, and confirmed, and by these presents do grant, bargain, sell, alien, and confirm, unto the said Benjamin Elliott, his heirs and assigns, a certain tract or parcel of land, situate, lying, and being in the county of Woodford, Scott, and Franklin, containing nine hundred and thirty-six acres, beginning at a lynn, two hickories and buckeyes, in Lewis's line; thence N. 18 E. crossing Beall's run at 74 poles, Leestown road at 122 poles, Elkhorn at 383 poles, to ash

and two buckeyes, Lewis's corner; thence S. 69 E., crossing Elkhorn at 256 poles, again at 100 poles, 251 poles, to a white oak, buckeye, hickory, and two ironwoods, in the edge of a drain, and corner to Francis Peart; thence S. 15 W. crossing Elkhorn at 60 poles, 542 poles, to a buckeye and five elms another corner to Francis Peart; thence N. 70½ W. 81½ poles, to a white oak, buckeye, and honey locust; thence S. 18 W., 29½ poles, to ash, buckeye and two sugar trees; thence N. 76½ W., 208 poles, to the beginning; likewise eighty-four acres, more or less, which the said James and Sarah G. Elliott are entitled to from the estate of Leroy G. Peart, deceased, adjoining the said land, the above land Sarah G. Elliott's portion of her father's land. To have and to hold the said tract or parcel of land hereby conveyed, with all and singular the appurtenances thereunto belonging, or in any wise appertaining thereto, unto the said Benjamin Elliott, his heirs and assigns for ever; and the said James and Sarah G. Elliott, for themselves, their heirs, executors, and administrators, do covenant and agree to and with the said Benjamin Elliott, his heirs, executors, and administrators, that they will warrant and for ever defend the right and title to the land hereby conveyed, from James and Sarah G. Elliott, their heirs, executors, and administrators, and from all and every person or persons whatsoever.

In witness whereof, the said James and Sarah G. Elliott have hereunto set their hands and seals, the day and year above written.

JAMES ELLIOTT, [L. S.]
SARAH G. ELLIOTT, [L. S.]

Teste,
HANSFORD TUTT,
LEWIS TUTT,
his
PATRICK ⋈ McFERRIN.
mark

WOODFORD COUNTY, sct.—*September* 11, 1813.

This deed from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by the said James and Sarah to be their act and deed, and the same is duly recorded in my office.

JOHN McKINNEY, Jr., *C. W. C.*

WOODFORD COUNTY, sct.—*November county court*, 1823.

On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court by the endorsement on the deed from James Elliott and wife to him, under date of the 12th of June, 1813, and by parol proof that the said deed was acknowledged in due form of law by Sarah Elliott, before the clerk of this court, on the 11th day of September, 1813, but that the certificate thereof was defectively made out, it is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded; whereupon the said certificate was directed to be amended to read in the words and figures following, to wit:

"WOODFORD COUNTY, sct.—*September* 11, 1813.

"This day the within named James Elliott, and Sarah his wife, before me, the clerk of the court for the county aforesaid, and acknowledged the within indenture to be their act and deed; and the said Sarah being first examined

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privily and apart from her said husband, did declare that she freely and willingly sealed and delivered said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded." The said deed, order of court, and certificate, as directed to be amended, is all duly recorded in my office.

Teste, JOHN McKINNEY, Jr., *C. W. C. C.*

Endorsements on the back of the foregoing deed, to wit:

JAMES ELLIOTT ET UX. TO BENJAMIN ELLIOTT—*Deed.*

Acknowledged by James Elliott and Sarah G. Elliott, September 11, 1813.

Att. J. McKINNEY, JR., C. W. C.

R. B. F. page 199.

Recorded deed book K, page 56 and 57.

Att. C. H. Mc., *D. Clk.*

And afterwards, to wit, at the November term of the court aforesaid, in the year of our Lord, 1825, on motion of the complainants, upon bill filed, it is ordered that an injunction be awarded the complainants against the defendants, enjoining and restraining them from committing waste of timber or otherwise upon the premises in the bill mentioned, agreeably to the prayer of the bill, upon the complainants giving bond in the penalty of five hundred dollars, with Robert Wickliffe as security, conditioned for the payment of the costs of this suit, and of all damages that may be awarded the defendants against the complainants for suing out said injunction.

INJUNCTION BOND, TO WIT:

Know all men by these presents, that William Peersol, Lydia Peersol, Ann North, Jane North, Sophia North, Elizabeth F. P. North, and William North, and Robert Wickliffe, are held and firmly bound unto James Elliott, Cordelia Elliott, Betsey Rogers, John Rogers, Benjamin Elliott, and A. L. Elliott, John Moore and M. T. Moore, Virginia Elliott and Lucy Elliott, in the just and full sum of five hundred dollars to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 7th day of January, 1826.

The condition of the foregoing obligation is such, that, whereas the above bound William Peersol, Lydia Peersol, Ann North, Jane North, Elizabeth F. P. North, and William North, have obtained an injunction to stay waste on a certain tract of land in the county of Woodford, containing acres, which was recovered against them by John Doe, lessee of Peersol, &c, at the November term of the 7th circuit court United States, Kentucky district, in the year 1825—

Now, if the said William Peersol, &c., shall prosecute the said injunction with effect, or on failure thereof shall well and truly pay such costs and damages as shall be awarded against them, then the above obligation to be void, else to remain in full force and virtue.

R. WICKLIFFE, [L. S.]

CHANCERY SUBPŒNA AND INJUNCTION, to wit:

The United States of America to the Marshal of the Kentucky district, greeting:

You are hereby commanded to summon James Elliott, Cordelia Elliott, Betsey Rogers, John Rogers, Benjamin Elliott, A. L. Elliott, John Moore,

M. T. Moore, Virginia Elliott, and Lucy Elliott, citizens of the State of Kentucky, to appear before the Judges of our seventh circuit court of the United States in and for the Kentucky district, at the capitol in Frankfort, on the first Monday in May next, to answer a bill in chancery exhibited against them by William Peersol, Lydia Peersol, Ann North, Jane North, Elizabeth F. P. North, and William North, citizens of the State of Pennsylvania; and this they shall in no wise omit, under the penalty of four hundred dollars; and have then there this writ.

In testimony whereof, John Marshall, Esq., Chief Justice of the Supreme Court of the United States, hath caused the seal of our said court to be hereunto affixed, this 7th day of January, 1826, and of our independence the 50th year.

[L. s.] Attest, JOHN H. HANNA, *C. C. C. K. D.*

The defendants are hereby restrained and enjoined from committing waste on the tract of land on which they reside, until the matter in controversy between them and the complainant is finally determined.

Attest, JOHN H. HANNA, *C. C. C. K. D.*

MARSHAL'S RETURN, to wit:

Executed on Benjamin Elliott, John Moore, and M. T. Moore, 30th January, 1826; and on the other within named defendants, 16th February, 1826, except John Rogers, who was not found.

JAMES C. COLEMAN, *Deputy Marshal,*
For C. Coleman, M. K. D.

The United States of America to the Marshal of the Kentucky district, greeting:

You are hereby again commanded to summon James Elliott, Cordelia Elliott, Betsey Rogers, John Rogers, Benjamin Elliott, A. L. Elliott, John Moore, M. T. Moore, Virginia Elliott, and Lucy Elliott, citizens of the State of Kentucky, to appear before the Judges of our seventh circuit court of the United States in and for the Kentucky district, at the capital in Frankfort, on the first Monday in November next, to answer a bill in chancery exhibited against them by William Peersol and Lydia Peersol, Ann North, Jane North, Elizabeth F. P. North, and William North, citizens of the State of Pennsylvania; and this they shall in no wise omit, under the penalty of four hundred dollars; and have then there this writ.

In testimony whereof, John Marshall, Esq., Chief Justice of the Supreme Court of the United States, hath caused the seal of our said court to be hereunto affixed, this 13th day of June, 1826, and of our independence the 50th year.

[L. s.] Attest, JOHN H. HANNA, *C. C. C. K. D.*

To be executed on John Rogers only.

The defendants are hereby restrained and enjoined from committing waste on the tract of land on which they reside, until the matter in controversy between them and the complainants is finally determined.

Attest, JOHN H. HANNA, *C. C. C. K. D.*

MARSHAL'S RETURN, to wit:

Executed on John Rogers, July 6, 1826.

JAMES C. COLEMAN, *Deputy Marshal.*
For Chapman Coleman, M. D. K.

And afterwards, to wit, at the November term of the court aforesaid, in the year 1826, (until which time this cause was continued,) came the complainants by their counsel; and on his motion, it is ordered that Anderson Taylor be appointed receiver to receive the rents and profits of the estate in controversy between the parties, and hold them subject to the order of this court, upon the said Taylor entering into bond with Robert Wickliffe his security, in the penalty of two thousand dollars, conditioned for the faithful performance of the trust reposed in the said Taylor.

And afterwards, to wit, at the November term of the court aforesaid, in the year 1826, came the defendants by their counsel; and on his motion, the order appointing Thompson Taylor a receiver, at a former day of this term, be, and the same is hereby, set aside.

And afterwards, to wit, at rules held in the clerk's office of the court aforesaid, in the month of March, and year 1828, (until which time this cause was continued on the rules,) came the complainants by their counsel, and gave the defendants a rule to file their answer herein.

And afterwards, to wit, at rules held in the clerk's office of the court aforesaid, in the month of April, and year 1828, (until which time this cause was continued,) came the complainants again by their said attorney; and the defendants still failing to answer the bill of the said complainants, although ruled so to do, it is, on motion of the complainants by their counsel, ruled that the complainant's bill be taken for confessed against the said defendants, and the cause is set for hearing at the next term of this court.

And afterwards, to wit, at the May term of the court aforesaid, in the year 1828, the defendants, and each of them, having been duly served with the process of subpœna, and they and each of them failing to appear and answer the bill of the complainants, and it appearing to the satisfaction of the court that complainants have regularly taken their bill for confessed, for the want of appearance and answers from the defendants and each of them, the court do now approve and confirm said order taking the bill for confessed, and do further decree and order that unless the defendants shew cause to the contrary on or before the twenty-fourth day of the present term, that the court will then decree and order that they tender to the complainants, to be cancelled, the paper purporting to be a deed from Sarah Peart to Benjamin Elliott; and further, that they convey and release all right and title which they hold under said deed, with special warranty against them, their heirs and assigns; and also that they pay the costs of this suit, and render the possession, and further account for rents and profits, and waste committed since the death of the said Sarah Peart, alias Sarah G. Peart.

And afterwards, to wit, at the November term of the court aforesaid, in the year 1828, (until which time this cause was continued,) came the defendants by their counsel, and moved the court to set aside the decree nisi, and to file their answer; but the court not being advised, took time, &c.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the November term, 1828, by consent of parties the answer in this case is now to be filed, and the decree nisi set aside. And it is ordered that James Elliott be appointed guardian ad litem for Lucy Hart, an infant heir of James Elliott, deceased, his answer as such be now received, which is filed accordingly; and the parties further agree to waive the necessity of remanding the cause, and that it stand on the issue docket. Whereupon this cause was heard upon the bill, answer, and exhibits filed, and also upon the record and proceedings in the action of ejectment referred to in the bill and answers, and the exhibits and depositions filed therein; and

the recital of the testimony of Steele, McKinney, &c. to have, by consent, all the effect of formal depositions, subject to all exceptions for the want of competency in Steele and McKinney to prove by parol the fact stated by them.

ANSWER, to wit:

The answer of James Elliott, Benjamin Elliott, and Ann his wife, John T. Rogers, and Elizabeth his wife, John T. Moore, and Martha his wife, Thomas E. Hickman, and Virginia his wife, Cordelia Elliott, and Lucy Hart, the said Lucy being an infant, and answering by James Elliott, to a bill in chancery exhibited against them in circuit court of the United States for the district of Kentucky, by Peersol, &c., complainants.

These defendants, saving, &c., for answer, &c., say that they claim the land in the bill mentioned as heirs at law of James Elliott, deceased, as by the bill supposed, who held by conveyance from Benjamin Elliott, to whom the said James and his wife, Sarah Elliott, conveyed or attempted to convey. These defendants would state that the fee simple to the land being in Sarah Elliott, the wife of the said James, they, the said James and Sarah, united in the execution of a deed to the said Benjamin, being the same instrument recorded in the office of the Woodford county court, as referred to by the bill of the complainants. They believe that it was duly signed by the said Sarah, and duly acknowledged before the clerk of the county court upon privy examination, and so endorsed by him in his own hand; although it is most true that the deputy clerk, in making out a certificate in form, gave to it, incorrectly, the shape of the relinquishment of the right of dower only. These defendants will also admit that after the death of the said Sarah, her husband being in full possession of the land, his attorney applied to the county court and obtained an order requiring a certificate corresponding with the truth as above stated and its record, the deed having remained in the custody of the said clerk from the first acknowledgment thereof until the final order and last recording. These things will best appear by reference to the deed and first endorsement in the handwriting of the clerk, and the certificates and order, and the proof taken on the trial of the ejectment in the bill mentioned; and these defendants are advised and contend that the title in law and in conscience is with them. They do not believe that the deed was obtained, or its acknowledgment made, under the influence of any misrepresentation or other improper means; and if they are to lose the land, it is because of a misprision or mistake of the deputy in making out a certificate on the deed, duly signed, sealed, and acknowledged, and deposited for record. If the estate shall be lost, it is not, as they believe, for any impropriety or defect in the transactions of the parties, but because of a clerical misprision of a deputy in the discharge of a ministerial act, and that inaccuracy, too, detected and corrected whilst the clerk retained the deed, and when, as they are advised, his power over it remained. It is true that before the record was finally consummated, in conformity to the fact, that the grantor died; but these defendants are advised and contend that the death of the feme covert between the acknowledgment and previous to the recording of the instrument, will not destroy it, but, in support of the instrument and the estate, the certificates and recording have relation to the acknowledgment.

These defendants acknowledge the action of ejectment and the judgment in this honorable court, and it is even reported that that judgment is affirmed, yet wherefore they do not understand. These defendants have not

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determined to prosecute any other suit, but hope they will be left free on that subject: if the law is for the complainants, they suppose they cannot suffer; if against them, a sufficient motive for the interposition of the chancellor is not perceived.

These defendants forbear to answer so much of the bill as relates to the appointment of a receiver, because the time has passed by in which it can avail.

These defendants know none of the complainants, nor their affinity to the decedent, Sarah Elliott, and cannot say nor admit that they are such heirs.

These defendants do not admit that any assurance was given to Sarah Elliott that she was only conveying a life estate, or other estate short of the fee simple, or that other misrepresentation was made as to the effect of that instrument, nor indeed of any kind.

They are advised that the bill of the complainant contains no matter upon which this honorable court can decree against them. They deny fraud, &c.

FRANKLIN COUNTY, sct.

James Elliott this day came personally before the undersigned, a justice of the peace of said county, and made oath that the facts stated in the within answer, so far as they are made from his own knowledge, are true, and those stated from information he believes to be true.

Given under my hand this 4th day of November, 1828.

H. WINGATE, *J. P.*

And afterwards, to wit, at the May term of the court aforesaid, in the year 1829, (until which time this cause was continued,) this cause came on to be heard; but the court not being advised, took time, &c.

And afterwards, on a subsequent day of the term and year last aforesaid, to wit, on the 15th day of May, in the year 1829, came the parties aforesaid, by their counsel; and the court being now sufficiently advised of and concerning the premises, do decree and order that the complainants' bill be, and the same is hereby, dismissed; and that the complainants do pay to the defendants their costs herein expended.

Whereupon, on motion of the complainants by their counsel, an apalpe is granted them to the Supreme Court of the United States, upon their entering into bond within twenty days, in the clerk's office of this court, with Robert Wickliffe as their security, in the penalty of five hundred dollars, conditioned according to law.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the May term, 1829, came the counsel for the complainants, and filed herein a petition for a rehearing of this cause.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the May term, 1829, the court not being sufficiently advised of and concerning the complainants' petition filed herein for a rehearing, do order that the same lay over until the next term of this court.

And afterwards, to wit, at the November term of the court aforesaid, in the year 1829, (until which time this cause was continued,) the court being now sufficiently advised of and concerning the complainants' petition for a rehearing of this cause, filed at the last term, do order that the said petition and motion be overruled.

Whereupon, on motion of the complainants by their counsel, an appeal is granted them to the Supreme Court of the United States, upon their enter-